

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
July 21, 2015

v

JOSEPH EDWARD MILNAR,

Defendant-Appellant.

No. 322533
Lapeer Circuit Court
LC No. 12-011262-FC

Before: FORT HOOD, P.J., and SAAD and RIORDAN, JJ.

PER CURIAM.

Defendant appeals by leave granted¹ an order of the circuit court denying his request to reduce his tier level for purposes of the sex offender registry. We affirm.

The instant case arises from defendant's motion to enforce his plea bargain agreement. Under the terms of the agreement, defendant pleaded no contest to attempted first-degree criminal sexual conduct (CSC I), MCL 750.92 and MCL 750.520b(1)(a) (sexual penetration with a victim under 13 years of age). Defendant's conviction required him to register under the Sex Offender Registration Act (SORA), MCL 28.721 *et seq.*, which categorizes attempted CSC I as a tier III offense, MCL 28.722(w)(vii). The plea agreement provided that after a year's successful compliance with the terms of his sentence, he could move to withdraw his plea to attempted CSC I and enter a no-contest plea to CSC IV, MCL 750.520e (sexual contact with a victim at least 13 years of age but less than 16 years of age). CSC IV is a tier II offense. MCL 28.722(u)(ix). The circuit court accepted the plea agreement.

A year after his sentence was imposed, defendant filed a motion to enforce the plea agreement and to reduce his tier level for the purposes of SORA from tier III to tier II. The circuit court granted his motion to enforce the terms of the plea agreement, but denied his motion to reduce his tier level, noting that the presentence investigation report (PSIR) clearly indicated that even if defendant's charge were reduced to CSC IV, he would still have to register as a tier III offender.

¹ *People v Milnar*, unpublished order of the Court of Appeals, entered July 31, 2014 (Docket No. 322533).

Defendant argues on appeal that the circuit court abused its discretion in denying his request to reduce his SORA tier level. We disagree.

We review a trial court's decisions regarding sentencing for an abuse of discretion. *People v Martinez*, 307 Mich App 641, 646; 861 NW2d 905 (2014). "An abuse of discretion occurs when the trial court's decision is outside the range of principled outcomes. Underlying questions of law are reviewed de novo, while a trial court's factual findings are reviewed for clear error." *Id.* at 646-647 (citation omitted).

We initially note the unusual procedure taken by the parties and the trial court in this matter. Because of the parties' unconventional route, it does not appear that a similar issue has previously been presented to this Court. Because of the uniqueness of the situation, we limit our opinion to address defendant's specific position on appeal.

The SORA requires anyone convicted of a listed offense, MCL 28.722(j), to register as a sex offender. MCL 28.723(1)(a). As used in the SORA, "convicted" means, among other things, "[h]aving a judgment of conviction or a probation order entered in any court having jurisdiction over criminal offenses[.]" MCL 28.722(b)(i). A conviction pursuant to SORA includes a conviction subsequently expunged pursuant to Michigan's Setting Aside Convictions Act ("SACA"), MCL 780.621 *et seq.* MCL 780.622(3). Listed offenses under the SORA are divided into tiers. A tier II offender has to comply with SORA's requirements for 25 years, MCL 28.725(11), while a tier III offender has to comply for life, MCL 28.725(12).

Defendant asserts that the withdrawal of his CSC I plea acted to vacate both his CSC I sentence and his SORA registration status. Defendant claims that there was no agreement that he would be required to register as a tier III offender after his CSC I plea was withdrawn. Specifically, defendant points to the fact that the plea agreement did not provide that he would have to register as a tier III offender after withdrawing his plea, nor was such a term stated by the trial court at sentencing. Further, the trial court abused its discretion in relying on the PSIR.

Initially, we note that defendant is correct in his assertion that the plea agreement and sentencing transcript are silent regarding defendant's SORA registration status. The plea agreement provided:

Defendant waive to Circuit Court to plead no contest to CSC 1st (Person < 13), with initial sentence not to exceed 6 months in jail. If defendant successfully complies with terms of sentence, then after 1 year, Plaintiff can move to w[ith]draw his plea [and] allow conviction to enter for CSC 4th (2 yr max).

The terms of defendant's sentence were provided in the PSIR, and also stated by the trial court on the record. There was no mention of defendant's SORA tier status at sentencing. Defendant claims that because the plea agreement did not mention his SORA registration status, and the trial court did not reference it, he believed it would change after he withdrew his CSC I plea. However, defendant can provide no support for his assertion that an agreement regarding defendant's SORA registration requirements must be included in a plea agreement or addressed at sentencing.

Moreover, defendant's PSIR stated as follows: "Upon the court accepting the plea the defendant will be required to register as a sex offender and will be classified as a Tier III offender. . . . Even if the defendant's charge is reduced to Criminal Sexual Conduct-4th Degree, he will still be considered a Tier III offender." Defendant's claims of ignorance regarding this provision in the PSIR are inconsistent with the record. First, we note the importance of the PSIR. "Critical decisions are made by the Department of Corrections regarding a defendant's status based on the information contained in the [PSIR]." *People v Norman*, 148 Mich App 273, 275; 384 NW2d 147 (1986). "The Department of Corrections relies on the information contained in the PSIR to make critical decisions regarding a defendant's status." *People v Lloyd*, 284 Mich App 703, 705-706; 774 NW2d 347 (2009). "Therefore, it is imperative that the PSIR accurately reflect the sentencing judge's determination regarding the information contained in the report." *Id.* Because the accuracy of the PSIR is imperative, MCL 771.14(6) provides that "[a]t the time of sentencing, either party may challenge, on the record, the accuracy or relevancy of any information contained in the presentence investigation report."

At sentencing, the court asked defendant and defendant's attorney if the PSIR was correct, and both answered affirmatively. Specifically, neither defendant nor his attorney noted any objection to the language regarding defendant's SORA registration status. After hearing that defendant and his attorney had no objections to the PSIR, the court stated that it was going to follow the recommendation in the PSIR. Based on this record, we do not agree that the trial court abused its discretion in relying on the PSIR. Defendant was provided the PSIR before sentencing and confirmed that the information in the PSIR was correct on the record. Further, based on the clear law and policy of our state, we disagree with defendant's contentions that allowing the trial court's decision to stand would allow prosecutors to include additional conditions in the PSIR of which a criminal defendant was unaware. Defendant's argument is unconvincing, as the PSIR was provided to defendant and he was specifically permitted an opportunity to object to the contents. Thus, we do not agree that there is an overwhelming concern that the prosecutor "improperly fabricated" the condition contained therein, given the safeguards statutorily provided.

Additionally, this Court has explained that SORA is not a criminal punishment. *People v Golba*, 273 Mich App 603, 620; 729 NW2d 916 (2007). SORA "does not impose a penalty or punishment as a sanction for criminal violation Rather, SORA is a remedial regulatory scheme furthering a legitimate state interest of protecting the public; it was not designed to punish sex offenders." *Id.* This proposition lends further support to our position, and counters defendant's claim that his SORA registration should be equated with his sentence. According to defendant, the withdrawal of his plea acted to withdraw his sentence, *People v Brown*, 492 Mich 684, 687; 822 NW2d 208 (2012), and it follows that his registration pursuant to SORA would also change. However, given the well-established law that the purpose of SORA is to protect the public, not to punish the offender, we are unconvinced that defendant's SORA registration requirements are automatically vacated along with defendant's sentence, especially given the unique circumstances presented here.

Finally, we note that defendant's position is analogous to one whose conviction for CSC I has been expunged. MCL 780.622(3) provides that the expungement of a conviction does not impact the requirement to register pursuant to SORA. MCL 780.622(3) states that a person whose conviction for a tier I, II, or III offense has been expunged still is "considered to have

been convicted of that offense for purposes of [SORA].” The remedy to such a situation is addressed by MCL 28.728c, which provides criteria for a convicted individual to petition the court to discontinue their SORA registration.

For the reasons provided, we ultimately conclude that the trial court did not abuse its discretion in denying defendant’s motion to reduce his SORA tier level.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Henry William Saad
/s/ Michael J. Riordan